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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10 AF HOLDINGS LLC,) Civil No. 12cv01525 LAB(RBB)
11)
12 Plaintiff,) **ORDER DENYING PLAINTIFF'S EX**
13 v.) **PARTE APPLICATION FOR LEAVE TO**
14 JOHN DOE,) **TAKE EXPEDITED DISCOVERY [ECF**
15 Defendant.) **NO. 3]**

16 Plaintiff's Ex Parte Application for Leave to Take Expedited
17 Discovery was filed on June 28, 2012, along with the Declaration of
18 Peter Hansmeier and an exhibit [ECF No. 3]. Because no Defendant
19 has been named or served, no opposition or reply briefs have been
20 filed. For the reasons discussed below, the Ex Parte Application
21 is **DENIED**.

22 **I.**

23 **PROCEDURAL HISTORY**

24 On June 20, 2012, Plaintiff AF Holdings, LLC ("AF Holdings")
25 filed a Complaint with attachments [ECF No. 1]. The Plaintiff
26 asserts copyright infringement claims against John Doe
27 ("Defendant"). (Compl. 7-10, ECF No. 1.) Defendant allegedly
28 / / /

1 copied and distributed a video that AF Holdings purports to be the
 2 registered owner of, and hold the exclusive rights to. (Id. at 1-
 3 2.) First, the Plaintiff alleges a claim for direct copyright
 4 infringement, stating that Defendant reproduced and distributed the
 5 copyrighted video through the Internet without Plaintiff's
 6 authorization. (Id. at 1, 7.) Second, AF Holdings pleads
 7 contributory copyright infringement, asserting that Defendant
 8 illegally obtained the video and assisted others in doing the same.
 9 (Id. at 1, 8.) Third, Plaintiff contends Defendant was negligent
 10 in failing to adequately secure his or her Internet access to
 11 prevent its unlawful use by others. (Id. at 9.)

12 Eight days after filing the Complaint, on June 28, 2012, the
 13 Plaintiff filed this Ex Parte Application seeking leave to take
 14 expedited discovery. (Pl.'s Ex Parte Appl. Leave Take Expedited
 15 Disc. 1, ECF No. 3.) The Plaintiff seeks permission to take "early
 16 discovery" from the Doe Defendant's Internet Service Provider
 17 ("ISP"), Cox Communications, to ascertain the Defendant's identity.
 18 (Id. at 1-2; see id. Attach. #1 Decl. Hansmeier 10 ("Plaintiff
 19 needs early discovery from the ISPs, so that the name and address
 20 of the accused infringer can be obtained by Plaintiff").)

21 II.

22 THE BASIS FOR AN EX PARTE MOTION

23 "Ex parte applications are a form of emergency relief that
 24 will only be granted upon an adequate showing of good cause or
 25 irreparable injury to the party seeking relief." K. Clark v. Time
 26 Warner Cable, No. CV 07-1797-VBF(RCx), 2007 U.S. Dist. LEXIS
 27 100716, at *2 (C.D. Cal. May 3, 2007) (citing Mission Power Eng'g
 28 Co. v. Continental Cas. Co., 883 F. Supp. 488, 492 (C.D. Cal.

1 1995)). The moving party must be "without fault" in creating the
2 need for ex parte relief or establish that the "crisis
3 [necessitating the ex parte application] occurred as a result of
4 excusable neglect." Id. An ex parte application seeks to bypass
5 the regular noticed motion procedure; consequently, the party
6 requesting ex parte relief must establish a basis for giving the
7 application preference. See id. United States District Court
8 Southern District of California Civil Local Rule 7.1(e) outlines
9 the procedures for filing regular motions. Kashani v. Adams, No.
10 08cv0268 JM(AJB), 2009 U.S. Dist. LEXIS 34153, at *4 (S.D. Cal.
11 Apr. 21, 2009) (citing S.D. Cal. Civ. R. 7.1(e)). Ex parte
12 proceedings are reserved for emergency circumstances. Id.

13 Plaintiff's pending Ex Parte Application fails this test. See
14 Mission Power Eng'g Co., 883 F. Supp. at 492 (providing that many
15 ex parte motions are denied because the papers do not demonstrate
16 that emergency relief is necessary). AF Holdings does not discuss
17 whether its request is a proper subject for ex parte consideration
18 or why the regular noticed motion procedures must be bypassed. See
19 id. The Plaintiff generally submits that ex parte relief is
20 appropriate because without knowledge of Defendant's identity, the
21 parties cannot adequately confer. (Pl.'s Ex Parte Appl. Leave Take
22 Expedited Disc. 10-12, ECF No. 3.) Also, in support of its
23 argument addressing the merits of whether it should be given leave
24 to serve discovery, Plaintiff states that there is a risk that the
25 ISP will destroy the relevant logs before the parties conduct a
26 Federal Rule of Civil Procedure 26(f) conference. (Id. at 10 ("The
27 information is facing imminent destruction").

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Even construing Plaintiff's assertion in support of an attempt to justify the ex parte request, emergency consideration is not necessary. AF Holdings relies on the Declaration of Peter Hansmeier, a technician at a company that monitors and documents the Internet-based piracy of its clients' copyrighted creative content. (Id. Attach. #1 Decl. Hansmeier.) Hansmeier submits that ISPs keep track of the IP addresses assigned to their subscribers. (Id. at 9.) "ISPs have different policies regarding the length of time they preserve information about what IP address was associated with a given subscriber at a given date and time." (Id.) The Plaintiff also attaches copies of various ISPs' subpoena compliance policies. (Id. Attach. #2 Ex. B, at 2-20.) Although it attaches the policies of Comcast and Time Warner Cable & Road Runner, only Cox Communications, this Defendant's ISP, is relevant. Cox's records retention policy for subscriber information is three years. (Id. at 16.) Therefore, Plaintiff's misrepresentation that the subscriber information records are "facing imminent destruction" is disingenuous and may run afoul of Rule 11 of the Federal Rules of Civil Procedure. (Pl.'s Ex Parte Appl. Leave Take Early Disc. 10.)

III.

CONCLUSION

AF Holdings has failed to demonstrate that its request should be considered on an ex parte basis. "Lawyers must understand that filing an ex parte motion, whether of the pure or hybrid type, is the forensic equivalent of standing in a crowded theater and

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1 shouting, 'Fire!' There had better be a fire." Mission Power
2 Eng'g Co. v. Continental Cas. Co., 883 F. Supp. at 492.
3 Plaintiff's Ex Parte Application [ECF No. 4] is **DENIED**.

4 IT IS SO ORDERED.

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6 Dated: July 24, 2012


RUBEN B. BROOKS
United States Magistrate Judge

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8 cc: Judge Burns
9 All Parties of Record
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